STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED June 10, 2003
v	No. 239685 Oakland Circuit Court
EDDIE LUCHES LEE, JR., Defendant-Appellant.	LC No. 2000-175218-FC

Before: Cavanagh, P.J., and Gage and Zahra, JJ.

PER CURIAM.

Defendant appeals as of right his jury trial convictions for three counts of armed robbery, MCL 750.529, one count of felonious assault, MCL 750.82, and four counts of possession of a firearm during the commission of a felony, MCL 750.227b. Defendant was sentenced as a fourth habitual offender, MCL 769.12, to twenty-eight to fifty years' imprisonment for the armed robbery convictions, ten to fifteen years' imprisonment for the felonious assault conviction, and two years' imprisonment for the felony-firearm convictions.[1] We affirm.

I. Facts and Procedure

On July 17, 2000, between 1:00 p.m. and 1:30 p.m., defendant went into the National City Bank in Waterford wearing a black hooded sweatshirt, black pants, black shoes, and wearing a mesh, fencing-type mask. Defendant had a gun in his hand. Defendant walked directly behind a patron, Anthony Zylinski, pushed him against the teller window, put the gun to his head, and announced that it was a bank robbery. Defendant threw a knapsack and duffel bag to the teller, demanded money, and told Zylinski not to move. The teller's legs buckled and she fell. Defendant ordered the teller to get up or he would shoot Zylinski. The teller pulled herself up and put the money in the duffel bag. The teller's legs buckled again and defendant told her that he would "blow her away" if she did not get up. Zylinski urged defendant to stay calm. The teller gave defendant approximately $3000.

[1] Defendant also pled no contest to one charge of possession of a firearm during the commission of a felony, MCL 750.227b, and one charge of felon in possession of a firearm, MCL 750.224, prior to the trial.

Defendant then went to the next teller window where Tammy Sue Cummings was working. When Cummings saw what was happening, she ducked down and hit the security button. Defendant told Cummings, "[p]ut the fucking money in the bag, bitch or I'm going to kill you." Defendant told Cummings to hurry or he would "blow her head off." Cummings then put money in defendant's bag.[2] Before defendant left, a scuffle ensued between defendant and a customer, former police officer James A. Hildebrand. Defendant absconded with the money by foot.

Nahia Majzoub testified during trial, because she was the victim of a similar robbery approximately three months earlier at a gas station. Majzaub testified that at approximately 2:00 to 3:00 p.m. on April 25, 2000, she and her husband were in the Sunoco gas station when defendant walked in, without a mask, wearing a hooded sweatshirt. Defendant pointed the gun at both Majzaub and her husband and stated, "put the fucking money in the bag." Defendant then became very angry and repeatedly swore at Majzaub and her husband. Majzaub's husband gave defendant the money, and defendant absconded with the money on foot. On October 18, 2000, Majzaub went to the police department and picked defendant out of a corporeal line-up as the person who robbed the gas station.

Prior to trial, defendant objected to the use of one of the prosecution's peremptory challenges to strike an African American woman. Defendant maintained the juror was removed solely based on race. The trial court denied the objection. This appeal ensued.

II. Analysis

A. Other Acts Evidence

Defendant first argues that the trial court abused its discretion in allowing the prosecution to admit other acts evidence. We disagree. Admission of evidence is within the sound discretion of the trial judge and will not be reversed on appeal absent a clear abuse of discretion. *People v Figgures*, 451 Mich 390, 398; 547 NW2d 673 (1996).

"Evidence of other crimes, wrongs, or acts is admissible under MRE 404(b) if the evidence is '(1) offered for a proper purpose and not to prove the defendant's character or propensity to commit the crime, (2) relevant to an issue or fact of consequence at trial, and (3) sufficiently probative to outweigh danger of unfair prejudice, MRE 403.'" *People v Aguwa*, 245 Mich App 1, 7; 626 NW2d 176 (2001), quoting *People v Ho*, 231 Mich App 178, 185-186; 585 NW2d 357 (1998). Other acts evidence can be used to demonstrate a common system and plan carried out by the defendant. *People v Pesquera*, 244 Mich App 305, 319; 625 NW2d 407 (2001); *People v Sabin (After Remand)*, 463 Mich 43, 61-62; 614 NW2d 888 (2000). In order for the evidence to prove a systematic plan, the charged and uncharged conduct must be "sufficiently similar." *Pesquera, supra* at 319; *Sabin, supra* at 63.

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[2] Cummings picked defendant's picture from a photographic line-up a few weeks after the robbery based upon the shape of defendant's head and height of his forehead. Defendant objected to the identification, however, this motion was denied.

In the present case, both robberies occurred during the day by a man wearing a hooded sweatshirt, with the hood upon his head. Both robberies happened in Waterford within a few blocks from each other during the afternoon. Both robberies involved a handgun, and the assailant in both robberies was yelling, angry and used the words, "put the money in the fucking bag." The assailants in both instances escaped by foot. Whether the events surrounding these two robberies were "sufficiently similar" to conclude that evidence of the former robbery was admissible under MRE 404(b) to establish a common scheme, plan or motive in the latter robbery presents a very close question. Consequently, we cannot conclude the trial court abused its discretion in admitting evidence of the gas station robbery in this case for the limited purpose of establishing a common scheme, plan, or system theory of logical relevance. Evidentiary questions are reviewed for an abuse of discretion. An abuse of discretion cannot be found merely because a reviewing court might have ruled differently. Rather, an abuse of discretion will only be found where the decision to admit or preclude evidence defies logic. The trial court did not abuse its discretion in this case.

Additionally, we cannot conclude that the danger of undue prejudice substantially outweighed the probative value of the evidence. MRE 403; *People v VanderVliet*, 444 Mich 52, 64-65; 508 NW2d 114 (1993). Although there is always a danger of prejudice when admitting other acts evidence, the similarities that the evidence established between the charged and uncharged occurrence were significant and were presented to the jury to rebut defendant's claim of mistaken identity. Further, the trial court properly instructed the jury regarding the appropriate use of the evidence. A trial judge's limiting instruction to the jury helps eliminate the danger of unfair prejudice. *People v Starr*, 457 Mich 490, 499-500; 577 NW2d 673 (1998).

B. Identification Evidence

Defendant next asserts that the trial court was clearly erroneous in denying defendant's request to suppress the identification testimony by Cummings. Specifically, defendant argued that he was denied a corporeal show-up and that the photographic show-up was unduly suggestive. We disagree. A trial court's decision to admit identification evidence is reviewed under a clearly erroneous standard. *People v Kurylczyk*, 443 Mich 289, 303; 505 NW2d 528 (1993), cert den 510 US 1058; 114 S Ct 725; 126 L Ed 689 (1994). "Clear error exists when the reviewing court is left with the definite and firm conviction that a mistake has been made." *Kurylczyk*, *supra* at 303.

Generally, a corporeal identification is superior to a photographic identification. *Simmons v United States*, 390 US 377, 383; 88 S Ct 967; 19 L Ed 2d 1247 (1968). However, if the defendant is not in custody at the time of the photographic show-up, the police may conduct a photographic show-up. *People v Anderson*, 389 Mich 155, 186-187; 205 NW2d 461 (1973). The requirement of a corporeal show-up has not been extended to precustody, prequestioning, or mere suspicion phase of a criminal investigation. *People v Lee*, 391 Mich 618, 625; 218 NW2d 655 (1974). Defendant was not in custody at the time of the photographic show-up. The record suggests that the photographic show-up was conducted during the precustody, prequestioning, and "mere suspicion" phase of the investigation.

Moreover, there was no support in the lower court record to sustain a claim that the photographic show-up was highly suggestive. "A photographic identification procedure violates a defendant's right to due process of law when it is so impermissibly suggestive that it gives rise

to a substantial likelihood of misidentification." *People v Gray*, 457 Mich 107, 111; 577 NW2d 92 (1998). Although defendant claims that the photographic show-up was unduly suggestive because defendant was the only individual in the show-up wearing a sweatshirt with a hood, defendant was not wearing the hood upon his head in the photograph. All persons pictured in the photograph had facial hair and similar haircuts. Cummings made no comment about defendant's clothing in recalling her identification. Cummings further testified that the fact that defendant was wearing a hooded sweatshirt did not impact her identification of defendant. Cummings testified that the identification was based upon the shape of defendant's head and the "tallness" of his forehead.

Additionally, the prosecutor explained that defendant's picture was his latest booking photograph, which was routine procedure, and had nothing to do with what defendant was wearing. Further, Cummings was shown six color photographs, all of African-American males. The record is devoid of any statements made by the police during the photographic show-up implicating defendant, and the record does not indicated that Cummings hesitated in her identification of defendant. Therefore, there is no indication that the photo show-up was impermissibly suggestive. Accordingly, the trial court was not clearly erroneous in admitting the identification.

C. Impartial Jury

Defendant argues that he was denied his right to a fair and impartial jury because minorities were underrepresented in the jury venire.[3] We disagree. "Questions of systematic exclusion of minorities from venires are reviewed de novo by this Court." *People v Hubbard (After Remand)*, 217 Mich App 459, 472; 552 NW2d 593 (1996).

In determining whether a defendant was denied his constitutional right to have an impartial jury drawn from a fair cross section of the community, the following must be met: "(1) the group alleged to be excluded must be a distinctive group in the community; (2) the representation of this group in venires from which juries are selected is not fair and reasonable in relation to the number of such persons in the community; and (3) the underrepresentation is due to systematic exclusion of the group in the jury-selection process." *People v Williams*, 241 Mich App 519, 525-526; 616 NW2d 710 (2000). Furthermore, a defendant must produce evidence concerning the underrepresentation of African-Americans on jury venires in general. *People v Howard*, 226 Mich App 528, 533; 575 NW2d 16 (1997).

Defendant has failed to establish any evidence that jury venires generally in Oakland County do not support a fair cross section of the Oakland County population, including African-Americans. Further, defendant has failed to establish a problem inherent within the selection

[3] Although defendant argues in his question presented that the trial court abused its discretion in denying his *Batson* challenge, defendant fails to support with any authority his *Batson* argument on appeal. See *People v Batson*, 476 US 79; 106 S Ct 1712; 90 L Ed 2d 69 (1986). A defendant may not merely announce its position and then leave it up to this Court to discover and rationalize a basis for his claims, or to search for authority to sustain or reject his position. *Wilson v Taylor*, 457 Mich 232, 243; 577 NW2d 100 (1998). Therefore, we decline to address this issue on appeal.

process that results in systematic exclusion. Therefore, defendant has failed to establish that he did not receive an impartial jury drawn from a fair cross section of the community.

D. Sentencing

Last, defendant argues that the trial court reversibly erred in scoring fifty points on OV-7, and therefore, he should be re-sentenced.[4] We disagree. This Court reviews issues of scoring of the guidelines to determine whether the evidence supported the scoring. *People v Leversee,* 243 Mich App 337, 349; 622 NW2d 325 (2000).

Under offense variable 7, aggravated physical abuse, fifty points may be assessed if "[a] victim was treated with terrorism, sadism, torture, or excessive brutality." MCL 777.37. Specifically, offense variable 7 defines "terrorism" as, "conduct designed to substantially increase the fear and anxiety a victim suffers during the offense." MCL 777.37. The trial testimony supported the scoring decision. Defendant walked behind Zylinsky, pushed him against the teller window, and put a gun to his head. Additionally, one teller testified that defendant threatened to "blow her away," while another teller testified that defendant threatened to "blow her head off." One teller believed defendant's threats as evidenced by her knees buckling repeatedly during the robbery. Defendant's actions of repeatedly threatening the life of Zylinsky and the two bank tellers supported the trial court's finding that he deliberately engaged in conduct aimed at substantially increasing the fear and anxiety of the victims during the offense. *People v Johnson,* 202 Mich App 281, 289; 508 NW2d 509 (1993).

III. Conclusion

In sum, the trial court did not err in allowing the prosecution to introduce other acts evidence. The trial court did not err in denying defendant's pre-trial motion to suppress the identification of defendant by Tammy Sue Cummings. There is no merit to the claim that the jury selection process did not represent a fair cross section of the community. Last, the trial court did not err in scoring fifty points on OV-7.

Affirmed.

/s/ Mark J. Cavanagh
/s/ Hilda R. Gage
/s/ Brian K. Zahra

[4] The instant offense was committed on July 17, 2000, making it subject to the statutory sentencing guidelines. MCL 769.34(2); *People v Reynolds,* 240 Mich App 250, 253; 611 NW2d 316 (2000).